

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

ORIGINAL **74-1319**

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Page 5

IN THE
United States Court of Appeals
For the Second Circuit

**WESTINGHOUSE BROADCASTING COMPANY,
INCORPORATED, KYW-TV,**
Petitioner,
against

NATIONAL LABOR RELATIONS BOARD,
Respondent,
and

DIRECTORS GUILD OF AMERICA, INCORPORATED,
Intervenor.

On Petition to Review and Set Aside an Order of the
National Labor Relations Board and Cross-Application
for Enforcement of Same

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
Argument	
Point I—The record does not support the Board's contention that the Company's producer-directors are not supervisors	1
Point II—The record does not support the Board's assertion that producer-directors are not managerial employees	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bell Aerospace Company Division of Textron, Inc., 475 F.2d 485 (2d Cir. 1973), <i>aff'd in part</i> , — U.S. —, 85 LRRM 2945 (April 23, 1974)	10
International Ladies' Garment Workers Union v. NLRB, 339 F.2d 116 (2d Cir. 1964)	8, 9
NLRB v. Fullerton Publishing Co., 283 F.2d 545 (9th Cir. 1960)	4
Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949)	3, 4
Radio & Television Station WFLA (The Tribune Company), 120 NLRB 903, 42 LRRM 1100 (1958)	4, 5
Spicer Mfg. Corp., 55 NLRB 1491, 14 LRRM 112 (1944)	10

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POINT

The record does not support the Board's contention that the Company's producer-directors are not supervisors.

As the Company demonstrated in its main brief, the evidence in the record when considered as a whole compels

the conclusion that the Company's producer-directors at television station KYW-TV are both supervisors, within the meaning of Section 2(11) of the Act, and managerial employees, as the Board has previously defined that term.

In reaching the opposite conclusion, Counsel for the Board misconstrues key portions of the record, offers as support for his position testimony taken out of context and relies on factual determinations of the Regional Director that are wholly unsupported by the evidence in the record.

In its brief the Board erroneously contends that producer-directors do not responsibly direct their subordinates, because (as the Regional Director found) their instructions to the technicians "do not relate to the actual operation of the equipment or the manner in which the operations are carried out" (Bd. Br. 13).¹ The only evidence the Board offers to support this assertion is a general conclusory statement made by one of the Union's witnesses, Mr. Pyle, which the Board quotes out of context.² Not only

1. Numbers in parentheses, when preceded by "A" refer to pages of the Joint Appendix. Numbers in parentheses, when preceded by "Pet. Br." or "Bd. Br." refer respectively to pages in the Petitioner's main brief and the Board's brief.

2. The sole authority for the Board's position that producer-directors are not responsible for the performance of other employees, and, therefore, do not responsibly direct them in their work, is Mr. Pyle's statement in which he eschews responsibility for their performance, since that, Mr. Pyle concludes, is a matter of "their own individual ability, their own individual training" (A 101).

That statement, when read in context, does not support the Board's position, since Mr. Pyle merely was saying that he was not responsible for technicians' lack of ability or inadequate training. It does not follow, as the Board would have this Court believe, that producer-directors are not answerable, in the labor relations sense, for the poor quality of light or sound on a particular program or for the poor quality of camera shots cameramen take.

is such evidence insubstantial, it is utterly negated by the following testimony of the same Mr. Pyle, whose partiality toward the Union was evident throughout the hearing:

Q. "What I'm trying to get at, Mr. Pyle, is that that this crew is just not a group of autonomous individuals going about and doing what they feel or contributing to the show in the best way that they feel?"

A. Certainly not.

Q. There is somebody there who is responsible for it, is that not right?

A. *The director tells them what to do as far as the operation of the equipment is concerned, yes.*

Q. *And, that's what you do, don't you?*

A. *That's exactly what I do, yes, on the phones."*

(A 100) (Emphasis added.)

Further, the record shows without contradiction that producer-directors are fully responsible for the performance of production unit technicians. In this connection, the station's program manager testified that he holds the producer-director, not the individual technicians, fully accountable for deficiencies in the program's quality. It is the producer-director who must answer for the errors and shortcomings of production unit technicians, since the producer-director is the person "who is responsible for [the] show" and "who is in charge" (A 228). Moreover, Mr. Pyle himself admitted that he is answerable to the program manager for mistakes production crew members make during a broadcast, and that he undertakes to explain and to correct their mistakes (A 101, 102). Thus, the Company's producer-directors fit neatly within the *Ohio Power Co.* definition of the term "responsibly to direct,"

since the evidence unmistakably shows that they are "answerable for the discharge of a duty or obligation" *Id.* at 387. See also, *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545, 549 (9th Cir. 1960).

The Board misleadingly contends that there is no support in the record for the Company's assertion that producer-directors "customarily suspend technicians" (Bd. Br. 16). Obviously, the Board has improperly framed this issue, since the Company never asserted in its brief that producer-directors "customarily" suspend technicians. The Company properly and accurately pointed out in its brief that the record establishes that producer-directors have the power to suspend technicians and it is the existence of such power not the frequency of its use that ultimately determines supervisory status. See, *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949) and cases cited at p. 18 of the main brief. The Regional Director recognized that producer-directors have the power to suspend other employees, but then erroneously concluded that they were not supervisors (A 6).

Finally, although the Board attempts to distinguish some of the cases the Company cited in its main brief to show that in the past the Board has consistently found producer-directors to be supervisors, the Board did not, and, indeed, could not find any basis for distinguishing *Radio & Television Station WFLA (The Tribune Company)*, 120 NLRB 903, 42 LRRM 1100 (1958). There the television directors performed the same duties and had the same responsibilities as the Company's producer-directors in this case. Since the Board properly decided that the directors

in *Radio & Television Station WFLA* were supervisors, and since the facts of that case are indistinguishable from the facts in this case, we submit that the same result ought, in fairness, to obtain here.

POINT II

The record does not support the Board's assertion that producer-directors are not managerial employees.

The Company argued in its main brief that all of its producer-directors are managerial employees and, therefore, do not constitute an appropriate unit for purposes of collective bargaining, since they (a) actively participate in formulating, determining and effectuating management policies in connection with the content and format of the Company's programs and act as representatives of and spokesmen for the Company, and (b) have full authority to commit, and do commit, the Company's credit without prior approval when they implement sizable budgets for television shows they produce and direct. Counsel for the Board has utterly failed to refute the Company's twofold argument in support of producer-directors' status as managerial employees.

The Board in its brief apparently concedes that producer-directors have some responsibility for determining the form and content of television station KYW-TV's public affairs programs, but it attempts to argue that producer-directors' input into these programs is *de minimus* (Bd. Br. 21). The weight of the evidence does not support the Board's argument, since, as the record shows and as the Regional Director himself recognized, producer-directors

play a *key* role in developing the content and format of the programs they produce and direct (A 5, 95, 212-213, 227, 229-230, 343-344). In this connection, the station's program manager testified that when they act in the dual capacity of producer and director in connection with public affairs shows

"... producer-directors ... not spending most of their time on news would be producer/directors in the truest sense of the word; they would be responsible for their shows, all aspects of the budget ... personnel, guests, content, making sure its on the air, subject matter ... *you know making the decisions necessary to get the show on the air*" (A 227) (Emphasis added).

* * *

Q. "In other words when they function as a producer/director you are saying that they have the overall responsibility ... for the content

A. Yes" (A 227).

Moreover, the Board's assertion that Mr. Pyle has "little to do with the content of that show on a week to week basis" (Bd. Br. 22) is contrary to fact, since the record shows that Mr. Pyle has sole responsibility for

"... the preparation in discussing with the talent and the production assistant who is on the show what they're going to do and what the segment is going to be and those kinds of things, he would decide that ...

Q. So that eventually the content of any one of those particular shows is Mr. Pyle's responsibility, is that right.

A. Yes, sure" (A 231-232).

Indeed, the Regional Director himself found that, "In actual operation [Mr. Pyle] meets with the two hosts (talent) to discuss the content of the forthcoming shows" (A 5).

The mere fact that they may communicate to other members of management their decisions with respect to who the guests for a particular show will be or what topics will be discussed on a particular program does not detract in any way from the fact that it is the producer-directors who are primarily responsible for making these important management decisions. Nor does the record reflect that producer-directors' decisions in this area have ever been vetoed by another member of the management team (A 187). Thus, the overwhelming evidence supports the Company's position that it entrusts to producer-directors the content and format of public affairs programs just as it entrusts to "news-editors" the content and format of news programs (A 55-57).

The Board's assertion that the producer-director who is involved in the public affairs program the station produces in conjunction with Hunter College acts *solely* as a liaison to insure the supply of technical equipment to Hunter College likewise has no basis in the record. To the contrary, the record shows that that producer-director acts in a far more important and responsible capacity with respect to that program. His role was described at the hearing as follows:

"... he is the management representative on that show; and since it involves a number of agencies and including an institution of higher learning and a government agency, he is not the only director on the show; he is performing, as I understand it, in his function on the show largely as a technical director; *but, the key reason why we have him there is as the management representative on the show*; there is no one else there of any authority who can say, hey this is a problem or

here's the way we're going to do this or as Mr. Herring pointed out to bring things to the attention of either myself or Dave Beddow.

Q. *In other words he's the only Westinghouse management contact with that particular show; is that right?*

A. Yes; . . ." (A 237-238) (Emphasis added).

In addition to the fact that the Board's characterization of this producer-director's role is inaccurate and unsupported by the record, it offends common sense to think that, in light of the special nature of this public affairs program and the fact that it may be distributed nationally or even internationally (Pet. Br. 11-12, 26), the Company would have no other representative on the program other than one whose sole responsibility is to supply equipment to the College.

The Board's wholesale reliance on *International Ladies' Garment Workers Union v. NLRB*, 339 F.2d 116 (2d Cir. 1964)³ fails to meet the Company's argument that producer-directors' discretionary authority to commit their employer's credit and implement sizable budgets stamps them as managerial employees whom the Board itself routinely excludes from bargaining units.

As we demonstrated in our main brief (Pet. Br. 12-13), producer-directors have full and complete authority to commit the Company's credit for out-of-pocket expenses when they produce and direct public affairs programs that have above-the-line budgets (A 219). That authority is

3. Erroneously cited in the Board's brief as 399 F.2d 116 (Bd. Br. 23).

not limited to only one producer-director, Susan Horowitz, as the Board contends in its brief.⁴ To the contrary, the record clearly shows that other producer-directors besides Miss Horowitz, including Mr. Schmidt who testified at the hearing, produced and directed shows having above-the-line budgets and were responsible for implementing, and did, in fact, implement such budgets by pledging substantial sums of the Company's funds (A 216-218). Consequently, the Board's reliance on the *Garment Workers* case, where the record showed only that "some business agents in some areas or cities [had] supervisory authority over other . . . personnel," 339 F.2d at 123, is misplaced, since the evidence in this case establishes that producer-directors as a class possess the authority to commit the Company's credit in sizable amounts.

Moreover, in the *Garment Workers* case, the business agents this Court found not to be managerial employees did not exercise discretion comparable to that exercised by the Company's producer-directors. The business agents in that case were primarily concerned with the "day-to-day routine of industrial organization" (*International Ladies Garment Workers Union v. NLRB, supra*, at 123), and therefore did not and could not act regularly to obligate their employer to pay substantial amounts of money.

4. The Board appears also to contend that the Company ought to have raised the issue of Miss Horowitz' status as a managerial employee by challenging her ballot during the Board-conducted election. There is absolutely no evidence in the record that Miss Horowitz voted in the election. The tally of ballots shows that only four of the Company's five producer-directors actually voted in the election (A 22). It is sheer speculation to surmise that Miss Horowitz was one of the producer-directors who voted. Consequently, there is no evidence to show that the Company could have challenged her ballot had it wanted to.

The only other case the Board cites in support of its position, *Bell Aerospace Company Division of Textron, Inc.*, 475 F.2d 485 (2d Cir. 1973), *aff'd in part*, — U.S. —, 85 LRRM 2945 (April 23, 1974), is inapposite for the same reason. The record in that case made it clear that the Company's buyers'

“[d]iscretion and latitude for independent action must take place within the confines of the general directions which the employer has established.” *Bell Aerospace Division of Textron, Inc.*, 190 NLRB 431, 432, 77 LRRM 1265 (1971),

and that “in many instances the type of item to be procured [limited] the buyer to a particular vendor.” *Id.* at 432.

Unlike the employees in the cases cited above, the Company's producer-directors are not required to, and do not, follow any well-defined Company policy, but instead exercise far-reaching discretion when they implement budgets that may be in excess of \$30,000 (A 364). Accordingly, the authority possessed by these employees to exercise their discretion on behalf of the Company “stamps them as managerial.” *Spicer Mfg. Corp.*, 55 NLRB 1491, 1498, 14 LRRM 112 (1944).

Conclusion

For the foregoing reasons, this Court ought to grant the Company's petition to review and set aside the order of the National Labor Relations Board and deny the Board's cross-petition for enforcement of its order.

Respectfully submitted,

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WESTINGHOUSE BROADCASTING COMPANY INCORPORATED, :
KYW-TV,

Index No.

DONNA GIGLIO , being duly sworn,
deposes and says that she is over the age of eighteen years,
that she resides at 64-33 Cooper Avenue, Glendale, New York
New York 11227 , and that she is not a party to the above
entitled action .

That on the 19th day of September, 1974, she served the annexed Petitioner's Reply Brief on the attorney(s) hereinafter named by depositing ^{✓ two (2)} (X) true copy (ies) thereof contained in (X) securely sealed, post-paid wrapper(s), properly addressed to the said attorney(s) as follows:

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in the letter box regularly maintained and exclusively
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Donna Giglio
DONNA GIGLIO

Sworn to before me this
19th day of September, 1974.

Joseph Warken

JOSEPH WARKEN
Notary Public, State of New York
No. 03-9539130
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1976